

Incoterms amendments make it important to read and understand new definitions

THE INTERNATIONAL Chamber of Commerce ("ICC") has released its new 'Incoterms 2010', which will come into effect on 1 January 2011.

Incoterms are an internationally-agreed interpretation of trade terms to define the responsibility of parties to an international contract of sale. They were first published by the ICC in 1936.

The release of the new Incoterms has been awaited for some time as its terminology underpins so much of the contractual arrangements relating to international contracts of sale as well as international and domestic freight.

While many of the traditional terms may appear to have been retained, there has been significant review to the Incoterms so that even terms which have previously been well understood have now been amended. Accordingly, the new Incoterms warrant close attention.

Some of the fundamental changes include the following:

- The number of Incoterms has been reduced from 13 to 11.
- A number of rules have been revised and adopted to apply to any mode or modes of transport. These include the following:
 - EXW - Ex Works;
 - FCA - Free Carrier;
 - CPT - Carriage Paid To;
 - CIP - Carriage and Insurance Paid To;
 - DAT - Delivered at Terminal;
 - DAP - Delivered at Place; and
 - DDP - Delivered Duty Paid.
- There are rules for sea and inland waterway transport:
 - FAS - Free Alongside Ship;
 - FOB - Free On Board;
 - CFR - Cost and Freight; and
 - CIF - Cost, Insurance and Freight.

Some important aspects to consider from the new Incoterms are as follows:

- There is an entirely new DDP.
 - There is the new concept of "Free Alongside Ship" which recognises that the older concept of "Free On Board" (with responsibility stopping at some imaginary point where goods cross the ship's rail) may not be entirely practical.
 - The ICC acknowledges that Incoterms should apply to domestic as well as international sale contracts. Over time, the previous Incoterms had been applied to domestic contracts and the ICC has recognised that reality. As a result, many of the Incoterms now refer to obligations to export or import formalities "as applicable".
 - The Incoterms reflect that electronic communications are to have the same status as paper communications.
 - Taking into account the environment within which parties now trade, the Incoterms now include obligations for security clearances.
 - The Incoterms allocate charges for terminal handling.
 - The ICC recognises that there is often a "string" of sales relating to the same goods during their transit from the point of export to the point of import and delivery. Given that many of the parties in the middle of the "chain" or "string" will not actually "ship" the goods, the Incoterms refers to an alternative obligation to "procure goods to be shipped".
- Clearly, the Incoterms will retain their important status in relation to international trade. However, at the same time, it is still relevant to exercise care when using



ANDREW HUDSON
Partner, Hunt & Hunt Lawyers.

Incoterms. For these purposes, the following issues need to be considered.

- When referring to Incoterms, parties need to identify whether they are adopting "Incoterms 2000" or "Incoterms 2010".
- Contracts must clearly state which Incoterm is to be used. Real care needs to be taken in choosing the appropriate Incoterm and ensuring that the parties

are aware of the obligations associated with the Incoterms.

- Having adopted an Incoterm, care must be taken in adopting other contractual terms. For example, I often see contracts which refer to a specific Incoterm yet other provisions are included which are entirely inconsistent with that Incoterm. This error creates significant uncertainty as to the real intention of the parties and the terms of the contract.
- Importantly, Incoterms are not in themselves a contract of sale. They are an adjunct to the contract and proper negotiation of the remainder of the contract needs to be undertaken. For example, Incoterms do not govern the timing and manner of payment for relevant goods.

I would strongly urge those parties using Incoterms to review the new Incoterms and ensure that when they are used (whether in terms and conditions of sale or in contracts for sale) the appropriate and correct term is used in the context of the other contractual provisions.

As always, I would be pleased to assist further.